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No.

In the Supreme Court of the United States

OCTOBER TERM, 1980

LaPORTE TRANSIT CO., INC.,

Petitioner,

vs.

LOCAL UNION NO. 301, CHAUFFEURS, TEAMSTERS AND HELPERS, and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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I

QUESTIONS PRESENTED FOR REVIEW

In the context of litigation under Section 303 of the Labor Management Relations Act, 49 U.S.C. 187, seeking damages for a jurisdictional dispute:

1. Is a "work preservation" defense to a jurisdictional dispute charge contingent upon a contractual right to the work and/or a valid and binding grievance award which has its essence in a collective bargaining agreement?

2. Are work preservation motives in and of themselves sufficient to overcome the prohibitions of Section 8(b)(4)(D) when a competing claim or contractual right to the work exists?

3. Does the transfer of work to the "in" union under a collective bargaining agreement and with the concurrence of the "in" union's officials and the performance of such work by the "in" union for a period of approximately four and one-half months without complaint constitute a claim to the work for purposes of Section 8(b)(4)(D)?

4. Does the observance of the picket line of the "out" union by the "in" union constitute an effective disclaimer when (1) the two unions are locals of the same International and the latter's members are told the picketing is authorized by the International and is to enforce a valid grievance award and (2) the unions and the employer actively and cooperatively seek to resolve the

jurisdictional dispute during the course of the work stoppage by submitting the issue of the job transfer to an internal Union Committee?

5. Does an employer have the burden of proving that the "in" union had not disclaimed the work by its action in observing the picket line of the "out" union?

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TO THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES.

Your Petitioner, LaPORTE TRANSIT CO., INC., hereby petitions for a writ of certiorari to review the decision of the United States Court of Appeals, Seventh Circuit, reversing the United States District Court for the Northern District of Illinois denying Petitioner's claim for

damages under Section 303 of the Labor Management Relations Act, 29 U.S.C. 178, on the basis that a jurisdictional labor dispute did not exist.

II

PARTIES TO THE SUIT

The parties in this cause are LaPORTE TRANSIT CO., INC., [LaPorte], Petitioner, and LOCAL UNION NO. 301, CHAUFFEURS, TEAMSTERS and HELPERS, [Local 301], and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN and HELPERS OF AMERICA, [International], Respondents.

III

REPORTS BELOW

The initial decisions which were not reported are attached as Appendix A. The decision upon appeal is not yet reported and is attached as Appendix B. The case was captioned LaPORTE TRANSIT CO., INC. v. LOCAL UNION NO. 301, CHAUFFEURS, TEAMSTERS AND HELPERS, et al., and docketed as 78 C 1137 in the District Court and No. 80-1327 in the Court of Appeals.

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V

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

(1) The Judgment sought to be reviewed was dated and entered on January 16, 1981.

(2) The date of the order denying rehearing was February 18, 1981.

(3) The statutory provision believed to confer jurisdiction to review the judgment is 28 U.S.C. 1254(1).

VI

APPLICABLE STATUTES

The statutes involved in this cause are Sections 8(b)(4)(D) and 303 of the Labor Management Relations Act, 29 U.S.C. 158(b)(4)(D) and 187.

Section 8(b)(4)(D) makes it an unfair labor practice for a labor organization or its agents to resort to a strike or coercion where an object thereof is:

> "forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work."

Section 303 provides:

> "(a) It shall be unlawful, for the purpose of this section only in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4)(D) of the National Labor Relations Act, as amended.

"(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 of the National Labor Relation Act, as amended [29 U.S.C. §185] without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

VII

STATEMENT OF CASE

Procedural Steps

LaPorte complained in the U.S. District Court, Northern District of Illinois, that Local 301 and the International Union engaged in a strike and picketed its truck terminal at LaPorte, Indiana from August 22, 1976 until October 31, 1976 for the purpose of forcing LaPorte to assign work to employees in Local 301 rather than to employees in Local Union 298 of the same International in violation of Section 8(b)(4)(D) and 303 of the Labor Management Relations Act, 29 U.S.C. 158(b)(4)(D) and 187 [Act]. Jurisdiction was conferred on the Court by virtue of 28 U.S.C. 1337 and 28 U.S.C. 185 and 187.

District Judge McMillen decided the issue of liability in favor of plaintiff and after referral of the damage issues to a Magistrate, entered judgment against the defendants jointly in the amount of $338,140.07 and costs.

Local 301 and the International Union appealed the decision to the Court of Appeals for the Seventh Circuit which reversed the decision of Judge McMillen holding that there was no jurisdictional dispute between Local 301 and Local 298 during the work stoppage. A Petition for Rehearing was denied.

Factual Setting

LaPorte and Local 301 were parties to a collective bargaining agreement governing the employment of a truck driver whose duties were to pick up freight and deliver it within Lake and McHenry Counties, Illinois, with a truck maintained in Libertyville, Illinois. The drivers at LaPorte's main terminal in LaPorte, Indiana, were members of Local 298, which had a collective bargaining agreement with plaintiff governing the terms and conditions of employment of the Indiana drivers.

LaPorte as a motor common carrier operated in interstate commerce between points in northern Indiana and northern Illinois. Its only terminal was in LaPorte, Indiana, and its drivers operating from that terminal were members of Local 298.

LaPorte employed Robert Schotanus to drive a truck parked in Libertyville, Illinois, to make pickups and deliveries in Lake and McHenry Counties, Illinois. Freight picked up by Schotanus was transferred in Chicago to another truck and driven by a Local 298 driver to LaPorte, Indiana. Freight to be delivered in Lake and McHenry Counties was handled in reverse fashion.

On December 19, 1975, Local 301 notified LaPorte that the collective bargaining agreement between them and covering Schutanus was being terminated by the Local on its expiration date, *viz.*, March 31, 1976.

On and after December 9, 1975, LaPorte notified Local 301 that as of April 1, 1976, it would conduct all its operations from the LaPorte, Indiana, terminal and would utilize only Local 298 drivers stationed there, pursuant to its collective bargaining agreement with Local 298 and with the concurrence of that Local's officials, to service northern Illinois.

On March 25, 1976, LaPorte wrote Schotanus that he should report to LaPorte effective April 1, 1976, to drive his truck and to transfer his affiliation to Local 298. The Secretary-Treasurer of Local 301 thereupon wrote LaPorte that it would hold plaintiff responsible for any damages to Schotanus until the jurisdiction of Local 301 and Local 298 had been settled through proper channels. Although the truck in question was transferred to LaPorte upon termination of LaPorte's contract with Local 301 and despite LaPorte's offer to pay his moving expenses, Schotanus did not appear there for work nor transfer his affiliation to Local 298. He is no longer employed by LaPorte.

On April 1, 1976, the day after the collective bargaining agreement between Local 301 and LaPorte had expired, Schotanus and Local 301 filed grievances concerning LaPorte's action and asserted that LaPorte must use Local 301 personnel to make pickups and deliveries in the Illinois territory involved. A Joint Grievance Committee constituted pursuant to the collective bargaining agreement that had terminated on March 31, 1976, decided the matter in favor of Schotanus and Local 301 on April 14, 1976, ruling that the work performed in the Illinois area should remain performed by Local 301 personnel.[1]

On August 22, 1976, Local 301 personnel picketed LaPorte's terminal and induced some Local 298 personnel to join in the picketing and strike, thus stopping the operations of LaPorte. Local 301 stated that the picketing and strike were authorized by the International

[1] The propriety of this award was in issue. The District Court found the award had no efficacy and even if it did, the award provided no defense to or action under Section 8(b)(4)(D).

Union which assertedly paid strike benefits to personnel of both Locals. The picketing and strike did not cease until October 31, 1976, and were for the alleged purpose of forcing plaintiff to comply with the Joint Grievance Committee's award favoring Local 301 and Schotanus.

On August 25, 1976, LaPorte notified its employees that it considered the dispute to be between Locals 298 and 301 rather than between LaPorte and its employees. Also on August 25, the Central Conference of Teamsters notified plaintiff that the work stoppage had been authorized by the International Union because LaPorte had refused to comply with the grievance award.

During the course of the work stoppage, LaPorte, at the urging of Local 298 officials submitted a letter to a Committee of the International indicating the action it had taken and if required to secure formal approval of the change. The Committee, by terms of the expired collective bargaining agreement between LaPorte and Local 301, was authorized to approve of "change of operations". Local 298 and 301 personnel as well as LaPorte personnel, pursuant to notice, appeared at a meeting of the Committee in a Chicago suburb during the work stoppage but were advised at that time it was too late for the request to be put on the agenda and no further action was taken on it during the period of the dispute.

On October 27, 1976, LaPorte and Local 301 executed a memorandum of agreement resulting in the termination of the picketing and the withdrawal of the claims of Local 301 and Schotanus. After Local 301's picketing was terminated, Local 298's members returned to work for LaPorte.

Decision of the District Court

As pertinent to the instant appeal, Judge McMillen found that the grievance award, which involved matters subsequent to the termination of the collective bargaining agreement had no effect and the Committee did not have jurisdiction to award work to Local 301 after the contract expiration date and that Local 301 engaged in jurisdictional picketing and encouraged and induced the members of Local 298 to engage in a strike and a refusal to work for LaPorte and that the International authorized and financially supported the activities of both unions.

The Court also found that if the grievance award was valid and binding upon LaPorte it could not supersede the jurisdictional strike provisions of Section 8(b)(4)(D) and it provided no defense to the complaint. The International, by authorizing the work stoppage on behalf of both locals resulted in its being liable.

Decision of the Court of Appeals

The Court of Appeals reversed on the basis that Local 298 never claimed the work during the picketing but throughout that period consistently supported Local 301's claim and that this was evidenced by Local 298's helping Local 301 to retrieve the work during the entire work stoppage and to compel compliance with the grievance award.

VIII

REASONS FOR GRANTING THE WRIT

(1) The Court Erred In Finding That A Disputed Grievance Award Not Predicated On A Contractual Agreement Served As A Defense To A Jurisdictional Dispute Charge

Significant issues to be considered by this Court have been raised by the decision of the 7th Circuit that the picketing was not jurisdictional in nature, but to preserve the work Local 301 had performed.[2]

The initial issue is whether "work preservation" motives in and of themselves are sufficient to overcome the prohibitions of Section 8(b)(4)(D). The "work preservation" concept has its genesis under Section 8(e) of the Act. 49 U.S.C. 158(e), and seemingly relates to "contractual" rights, *i.e.*, a union has the right to self-help to enforce a contract right prohibiting the assignment of work it is entitled to perform and has performed to others. *American Boiler Manufacturing Assoc.* v. *N.L.R.B.*, 404 F.2d 547 (8th Cir. 1969).

The above was true, for example, in the case in which the "Safeway" theory on which the Court relied was developed. In *Highway Truck Drivers Local 107*, 134 NLRB, 1320 (1961), the NLRB found that the dispute was not jurisdictional but involved work preservation on the basis that the "in" locals did not press for the jobs and the "out" union was seeking to retain the jobs for its members. Significant to the issue before this honorable Court, however, was the fact that although

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[2] The Court indicated that the parties were enforcing a grievance award. Its subsequent reference to the "Safeway" Rule as espoused by the NLRB indicates that the "work preservation" theory was, in fact, being approved.

the contract which existed between the "out" union and the employer had expired, negotiations for a new contract had been requested and the job transfer issue was a negotiable item. The transfer had the effect of terminating the negotiations and the bargaining relations.

In the instant case, on the other hand, Local 301 terminated the contract, did not seek renegotiation of a new contract, and no negotiations were in progress. The transfer was lawful and did not transgress or terminate any viable union-management relationship.

Likewise, the judiciary has held that a contract right is not controlling upon the agency in a Section 10(k) proceeding, *N.L.R.B.* v. *Local 1291 Int'l. Longshoremen's Ass.*, 345 F.2d 4 (2nd Cir. 1965) and *Bechtel Corp.* v. *Laborers' Int. Union*, 405 F.Supp. 370 (M.Pa. 1975), aff'd. in part and rev'd. in part, 544 F.2d 1207 (3rd Cir. 1976), or that violation of a contract provision would be a defense in a Section 303 suit. *Old Dutch Farms, Inc.* v. *Milk Drivers & Dairy Emp. Union*, 359 F.2d 598 (2nd Cir. 1966). Similarly, this Court in *Labor Board* v. *Radio Engineer*, 364 U.S. 573 (1961) accepted the agency's argument that entitlement to the work on the basis of ". . . such factor as practice or custom" is not a defense to a suit under Section 303(a). (364 U.S. at 584)

If a contractual right, past practices, or customs are not determinative in and of themselves in resolving which union, the "in" or the "out" union, is entitled to the work under Section 10(k) and if a contract violation, practice or custom are not a defense to a Section 8(b)(4)(D) offense, on what basis can the desire of the "out" union to retain its work become a defense?

The above issue must and should be reconciled as should the further issue raised by the decision. Does an arbitration award which is not predicated on a viable contract[3] have the same efficacy as a contract provision for purposes of the work preservation doctrine?

In various decisions, either holdings or *dicta* indicate that an arbitration award prior to the dispute and/or the filing of a charge is not a defense to an unfair labor practice charge. The proper remedy, as found by the District Court, is to seek judicial enforcement of the award. See *Carey* v. *Westinghouse Corp.*, 375 U.S. 261, 270, 271 (1967), *Bechtel Corp.* v. *Laborers' Int. Union, supra,* 405 F.Supp. at 359, and *Plumbers and Fitters Local 761* v. *Matt J. Zaich Construction Co.*, 418 F.2d 1054 (9th Cir. 1969).

If an arbitration award has the same efficacy as a contract term, however, the same problem of reconciling work preservation disputes and jurisdictional disputes exists.

Finally, in the context of the instant case, another issue is pertinent and that is whether the grievance award on which a work preservation defense rests, if it may, must be a valid and binding one. In this case the District Court found the grievance award was not valid and then went further to find that even if it were valid it was not a defense to the jurisdictional dispute issue. The Seventh Circuit, on the other hand, did not discuss the issue and presumably found it valid and binding as any claim of Local 301 had to flow from the award as opposed to a contractual right since the contract had terminated.

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[3] In this case the contract had expired and the grievance award did not draw its essence from the contract.

In deferring to arbitration or voluntary settlement under Section 10(k) of the Act, the NLRB, with judicial concurrence, has always held that the arbitration or other means of settlement must be voluntarily entered into by all parties to the dispute and the settlement procedure must deal with the unfair labor practice charge. The foregoing did not occur in this case.

Significant issues which involve the real interests of the parties are present in this cause and should be resolved for their benefit as well as others who are confronted with similar situations.

The depressed economy assures that jurisdictional disputes and work preservation disputes will become an increasing part of the labor-management world.

(2) The Court Erroneously Placed The Burden Of Proving A Disclaimer On The Petitioner

In actions involving jurisdictional disputes it is submitted that if an existing union is performing the work and doing it without complaint up to the time of a strike or picketing, the burden is upon that union or the alternate union to establish that a disclaimer existed at the time of the dispute.

In the instant case, however, the Court of Appeals placed the burden on LaPorte when it stated:

> . . . Plaintiff [LaPorte] has been unable to show that during that entire time [of the dispute] Local 298 was ever seeking to perform the work that had been performed by a Local 301 member.

This finding by the Court was critical to the proper resolution of the case as the question of whether disputed claims for the work exist is generally considered critical to a jurisdictional dispute under Section 8(b)(4)(D).

The decision, however, conflicts with the decision of the Second Circuit in *N.L.R.B.* v. *Local 25, International Bro. of Electrical Wkrs.*, 383 F.2d 449 (2nd Cir. 1967) wherein the burden was imposed on the union to show by disclaimer or other proof that the other union or group had no substantial interest in the work (383 F.2d at 454).

The fact that Local 298 had accepted the work and performed it with the concurrence of its officials for a period in excess of four and one-half months prior to the picketing should, as a matter of law, have established that it claimed the work for purposes of Section 8(b)(4)(D).

In *N.L.R.B.* v. *Local No. 825, Internat. Un. of Op. Eng. AFL-CIO*, 410 F.2d 5 (3rd Cir. 1969), for example, it was noted that acceptance of a job made routinely by an employer even in the absence of demand by employees in their union constitutes a "claim" within the context of the statute.

The entire dispute here grew out of that work assignment and its acceptance and if there were some disclaimer it would seem logical that the burden would be on one of the Local unions to prove this.

The mere fact that the Local 298 personnel respected the picket line and some participated in it does not as a matter of law withdraw the dispute from the category of a jurisdictional dispute condemned by the statute. *Longshoremen* v. *Juneau Spruce Corp.*, 342 U.S. 237, 245 (1952).

Since a dispute existed at the time of the work stoppage and since observance of the picket line is not *per se* a disclaimer, it is clear that something more must be shown to effect a disclaimer.

As a logical matter, the union who no longer claims the work is the only entity who can adduce effective evidence of its position. It is illogical and unfair to ask an employer to prove a negative, *i.e.*, that the unions did not resolve their differences or that one did not accede to the position of the other.

Although the issue of the burden being on the union is inferred in the decision of this honorable Court in *N.L.R.B.* v. *Plasterers' Union*, 404 U.S. 116 (1971),[4] it has never been precisely dealt with to avoid the error made by the Court of Appeals in this cause and to resolve the seeming conflict between the Seventh Circuit and the Second Circuit.

It would behoove the Court to accept this Petition for the purpose of resolving this critical issue and to find that the Court of Appeals imposed an erroneous burden of proof on the employer. Parties must know what their burden of proof is tc iitigate effectively and that burden must not be an unfair and inequitable one.

(3) Mere Observance Of A Picket Line Cannot Be Equated To A Disclaimer

The Court of Appeals presumably equated Local 298's observance of the picket line with a disclaimer of its claim to work and held that during the period of work stoppage Local 298 never sought the work performed by Local 301. As previously noted, it placed the burden of proving the claim for work during the work stoppage on LaPorte.

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[4] This Court inferred the burden was on the union when it noted the N.L.R.B.'s function under Section 10(k) of the Act, 29 U.S.C. 160(k) evaporated ". . . when one of the unions renounces and refuses the work." (404 U.S. at 135)

Review of this finding is necessary because it is contrary to this Court's finding in *International Longshoremen's and Warehouse Union* v. *Juneau Spruce Corp.*, 342 U.S. 237 (1952) and various decisions including *Construction Employers' Ass'n. of Tex.* v. *International U. of O. E.*, 427 F.2d 230 (5th Cir. 1970) and *Int'l. Bd. of Carpenters, etc.* v. *C. J. Montag*, 335 F.2d 216 (9th Cir. 1964).

The significant question, which is of interest to labor and management alike, is whether observance of a picket line clearly predicated on jurisdictional issues constitutes a disclaimer.

Also of significance in the instant case is the additional question of whether observance of a picket line based on the representation that picketing is sanctioned by the Locals' International and based on a grievance award constitutes a disclaimer.

In the instant case, LaPorte legally transferred the work after its collective bargaining agreement was terminated by Local 301 and culminated in a transfer which was discussed with and had the concurrence of Local 298 officials.

The work was performed by Local 298 from April 1, 1976 until August 22, 1976 without complaint and with the knowledge of Local 298's officials that Local 301 had laid claim to the work.[5]

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[5] Letters had been sent by Local 301 with copies to Local 298 that it claimed the work and an official of Local 298 had attended a meeting with Local 301 officials and other union officials concerning the matter. Although the Local 298 official asserted it told the Local 301 and other union officials it would respect Local 301's claim and would tell LaPorte to get the matter straightened out, no such notice was given LaPorte.

After the picket line was established and Local 298 observed the picketing, no specific disclaimer was made orally or in writing by Local 298 despite the fact it participated in the negotiations occurring during the work stoppage.

Local 298 officials, in fact, during the course of the picketing, encouraged LaPorte to resolve the matter by requesting a "Change of Operations"* and that Local 298 would support the request to have the work transferred.

Local 298 observed the picketing on the basis of an official telling Local 298 personnel that ". . . a sister local had a decision, an award from the Grievance Committee in Chicago, and the company failed to comply with it and Local 301 was striking it, and that we should help our sister local and honor their picket line because the strike was authorized and sanctioned."

There was no evidence that at the time the picketing occurred Local 298 personnel had any knowledge of the substance of the grievance and once the picket line was established that it was observed because of the merits of the substantive issues involved or merely because (1) the individual members did not want to be "scabs"; (2) the individual members felt they were obligated to observe the pickets because they were authorized by the International; or (3) the individual members were being paid strike benefits and did not care what the issues were.

In the circumstances, it was clearly erroneous for the Court to infer that Local 298 had disclaimed the work and that no jurisdictional dispute existed.

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*"Change of Operations" is a contractual procedure whereby a company who desired to modify its operation during the term of a collective bargaining agreement petitions a Union Committee for permission to do so.

IX

CONCLUSION

This Court should grant certiorari, and the judgment of the United States Court of Appeals should be reversed.

Respectfully submitted,

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APPENDICES

A — Opinions of the District Court

B — Opinion of the Court of Appeals

C — Order Denying Petition for Rehearing (corrected)

D — Order Denying Petition for Rehearing

APPENDICES

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LA PORTE TRANSIT CO., INC.,

Plaintiff,

v.

LOCAL UNION NO. 301, CHAUFFEURS, TEAMSTERS AND HELPERS, etc., and I.B.T, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, etc.,

Defendants.

NO. 78 C 1137

DECISION

The complaint in this case was filed pursuant to §8(b)(4)(D) of the Labor Management Relations Act (29 U.S.C. §158(b)(4)(D)) seeking damages for a jurisdictional strike. The court took evidence on the merits and also has under advisement motions for summary judgment by defendants, with memoranda. The defendants' motions will be decided along with the merits, based on the evidence. The material facts are not in serious dispute.

Plaintiff is a trucking company with its principal place of business in LaPorte, Indiana. Some time in 1973 the company acquired the Cooper Cartage Company which had a certificate of convenience to operate in southern Wisconsin and northern Illinois. When the plaintiff acquired Cooper, it also assumed its collective bargaining contract with the defendant Local 301 which covered the Wisconsin-Illinois operation and ran to March 31, 1976. Only one driver worked under that contract, with one truck which was garaged in Libertyville, Illinois.

As of March 31, 1976, the Union terminated the contract by proper notice under Article 29, Section 1 and the company removed the situs of its truck from Libertyville, Illinois to LaPorte, Indiana. It actually removed its truck from Libertyville on March 31, 1976 when the contract was still technically in effect but after cessation of the business operations for that day.

On April 1, 1976, the sole Wisconsin employee, Robert Schotanus, filed a grievance with the plaintiff employer

> ". . . for all wages and fringe benefits that I have lost or will lose until I am reinstated to my rightful seniority spot and back on the payroll at LaPorte Transit Co., Inc."

On the same day, Local 301 filed a grievance against the company that

> "LaPorte Transit Company, Inc. must use Local Cartage drivers to make all the pickups and deliveries out of the Libertyville, Illinois terminal, covering the counties: northern part of Cook County, and all of Kane, Lake and McHenry Counties in Illinois, that LaPorte Transit Company, Inc. serves."

The two foregoing grievances were submitted to the Joint Grievance Committee pursuant to Article 19, Section 2(b) of the contract. The employer was represented at the hearing, but it does not appear that six employer representatives were appointed to the Committee as required by the contract. The company did not raise any question at the hearing concerning the jurisdiction of the Committee but now contends that it had none. The Committee rendered an unsigned decision on April 14, 1976 concluding that "all claims including monetary contained in both grievances are granted. The work performed within the Joint Area Cartage Agreement shall remain performed by the employees by said Agreement" [sic]. This decision apparently was intended to cover the Schotanus grievance with respect to wages and fringe

benefits and the Local 301 grievance with respect to the locale where the work was to be performed.

Schotanus was offered a job driving a truck out of LaPorte, Indiana but declined to take it. Teamsters Local Union 298, which represented the employees at LaPorte, serviced southern Wisconsin and northern Illinois from April 1, 1976 and thereafter with its members. On August 22, 1976, Local 301 began picketing at the plaintiff's LaPorte, Indiana terminal and was joined in this picketing by employees of Local 298; these actions effectively shut down plaintiff's operations. The "strike" was authorized by the defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America which paid strike benefits to the members including Schotanus. Plaintiff Ex. G.

The strike and picketing controversy was based contractually upon the plaintiff employer's failure to abide by the decision of the Joint Grievance Committee. Before and after termination of Local 301's contract, plaintiff had a contract with Local 298 of LaPorte which gave that Union the right to strike under Article 19, Section 3 if the company did not abide by an arbitration award. That provision also applies if the employer fails to appoint members of the Joint Grievance Committee or otherwise fail to comply with the arbitration provisions and also states "the action taken by the Union in recourse for enforcement of its rights shall not be arbitrable or reviewable by any tribunal." The Unions do not contend that the latter clause ousts this court from jurisdiction over a claim for damages.

When the strike was settled, the plaintiff and Local 301 entered into a "Memorandum of Agreement" dated October 27, 1976 which states in substance that Local 301 will cease picketing and "will waive any claim to jurisdiction over the work as well as claims it alleges as a result of a grievance filed by your local against our company on April 1, 1976." Local 301 also agreed to "ter-

minate, remove all pickets, and notify Local Union No. 298 and the appropriate parties in your international and/or regional organization that such action has been taken." The Union contends that the foregoing Memorandum of Agreement constitutes a release of any damages under Section 8(b)(4)(D) of the Labor Management Relations Act. We decided earlier in this case that the agreement was not sufficiently clear and unambiguous to grant the Union's motion to dismiss (Decision entered August 18, 1978).

There remain some issues of law which control the outcome of this case. The first issue is whether or not the award of the Joint Grievance Committee of April 14, 1976 has any force and effect. In our opinion a grievance which arose during the term of the contract can be properly arbitrated thereafter, even if the contract had been terminated. However, Schotanus received all of the pay that he was entitled to up through March 31, 1976, and the company offered him work at LaPorte thereafter. Neither Local 301 nor Schotanus had a contract covering the Libertyville terminal or the Illinois-Wisconsin operations after March 31, 1976. The Joint Grievance Committee purported to make a financial award to Schotanus for "all claims including monetary" and ruled that "The work performed within the Joint Area Cartage Agreement shall remain performed by the employees by said agreement." Since Local 301 and not Local 298 was the grievant, we find and conclude that the foregoing reference was intended to be to the Joint Area Cartage Agreement of Local 301 which had been terminated as of March 31, 1976.

The arbitration award therefore purported to retain the southern Wisconsin/northern Illinois work within the jurisdiction of Local 301. In passing, we find no basis for this award or any "monetary" award to Schotanus, since there was no contract after March 31, 1976 and he was fully paid up to that date. Nor did the Joint Grievance Committee have any jurisdiction to award work to Local 301 after that date. To the extent that

the award has any efficacy, however, we find that the plaintiff is bound by it, since it did participate by sending a representative to the hearing who, according to the decision, presented the employer's position. No complaint was made that the Joint Grievance Committee was improperly constituted (Stip. par. 13), but even if it were, we find that the employer waived this point by not appointing or even notifying its representatives.

If the arbitration award was beyond the jurisdiction of the Joint Grievance Committee, then the plaintiff's remedy would have been to attempt to set it aside legally or to sue Local 298 for a contract violation arising from its strike. Since Local 298 is not a party defendant herein, however, and since the company did not attempt to set aside the award, the question remains whether it can obtain relief against Local 301 under Section 8(b)(4)(D) of the Act, upon which this suit is based. This statute provides in pertinent part as follows:

> (b) It shall be an unfair labor practice for a labor organization or its agents—.
>
> (4) (i) to engage in or induce or encourage any individual employed by any person engaged in commerce or in any industry affecting commerce to engage in, a strike or a refusal in the course of his employment to . . . transport or otherwise handle or work on any goods, articles, materials or commodities or to perform any services or (ii) to threaten, coerce or restrain any person engaged in commerce or in an industry affecting commerce where in either case an object thereof is—. . .
>
> • • •
>
> (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization . . . unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work.

Section 303 of the Act (29 U.S.C. §187(b)) provides that the party injured by violation of the foregoing subsection may sue in this court for damages.

We have no doubt, based on the evidence, that Local 301 of Waukegan, Illinois was engaged in jurisdictional picketing, but not in a strike, at the plaintiff's premises in LaPorte, Indiana. By virtue of the picketing, Local 301 induced or encouraged the members of Local 298, the LaPorte Local, to engage in a strike and a refusal to transport or handle commodities for plaintiff. There is evidence that representatives of both of the local unions also engaged in threats or violence to enforce the picket line. The evidence also supports a finding that the defendant International Union authorized and financially supported the activity of the local unions. These acts violate Sections 8(b)(4)(i)(D) and (ii)(D) of the Act.

The defendant Unions contend that Section 8(b)(4) applies only to jurisdictional strikes arising from secondary, as distinguished from primary, disputes. We do not believe this distinction is helpful in the case at bar, however, since a general purpose of the section is to prevent coercion on employers to achieve the assignment of work to a specific, but uncertified, union. See *N.L.R.B.* v. *Local 825 Operating Engineers etc.*, 400 U.S. 297, 304 (1971); *International Longshoremen etc. Union* v. *Juneau Spruce Corp.*, 342 U.S. 237, 244 (1952). The proscribed activities are not limited to those involving two different employers. *N.L.R.B.* v. *Radio & Television Broadcast Engineers Union Local 1212 etc.*, 364 U.S. 577 (1961); *Construction Employers Association* v. *International Union of Operating Engineers Local 450*, 427 F.2d 230 (5th Cir. 1970). A proper consideration under Section 8(b)(4)(i)(D) and (ii)(D), in our opinion, is whether or not the action is to achieve union jurisdictional objectives, including jurisdiction between two locals involved with a single employer. The grievances, the arbitration award, and the facts and circumstances of this case lead us to find that the defendants' actions were designed to require the plain-

tiff to assign work to a member of Local 301 in Wisconsin rather than to members of Local 298 which was doing the work after March 31, 1976. This is a violation of the terms of subsection (D).

The next legal question which we perceive is whether the award of the Joint Grievance Committee, if valid and binding upon the employer, can supersede the jurisdictional strike provisions of Section 8(b)(4). Local 301 no longer had a contractual right to picket or strike. It did have an arbitration award on which it could sue under Section 301 of the Labor Management Relations Act. *General Drivers, etc. Local 89* v. *Riss & Co.*, 372 U.S. 517 (1963). The arbitration award, however, provides no defense to an action for damages under Section 8(b)(4). We find no legal or contractual justification for the Union's engaging in a jurisdictional picket line at the employer's place of business between August 22 and October 31, 1976.

The fact that the International Union authorized the strike on the basis of the company's refusal to comply with the grievance panel's decision (Plaintiff Ex. a) does not excuse Local 301's violation of Section 8(b)(4), particularly since that Union had a perfectly clear legal remedy available, a suit to enforce the award. The International's authorization of the work stoppage on behalf of both local unions also imposes liability on that defendant.

Finally, we reach the question of the proper interpretation and application of the settlement agreement dated October 27, 1976 which was entered into between Local 301 and the employer. Before the strike ended, the plaintiff employer had notified the International Union that unless the picketing and strike were terminated immediately, it would take all legal steps available, "including appropriate suits for damages" (Plaintiff Ex. F). The employer's representative who negotiated the settlement agreement was instructed by the company president not to waive or release any claim for damages. The Union

representative, Robert Barnes, testified that he "believed" that neither side was looking for anything more than pay for Schotanus and that Schotanus no longer wanted to work for the plaintiff; the matter of the location of the truck and the jurisdiction of Local 301 had therefore become moot. Since the Memorandum of Agreement signed thereafter by the parties does not specifically refer to any claim for damages by the employer, or release them, we believe that this absence of any provision controls. Defendants do not claim that a release was inadvertently or fraudulently omitted, and there is no basis for reforming the Memorandum of Agreement. It permits an action for damages by the company. The memorandum does not run in favor of the International Union at all, so it has no bearing on the statutory liability of that defendant.

We therefore find and conclude that the plaintiff is entitled to recover damages from both defendants resulting from the picketing of August 22 to October 31, 1976. Defendants' motion for summary judgment is denied. The issue of liability is found in favor of the plaintiff, and this case will be referred to a magistrate for a recommendation on the amount of damages.

ENTER:

/s/ Thomas R. McMillen
Judge, U.S. District Court

Dated: May 9, 1979

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

LA PORTE TRANSIT CO., INC.,

Plaintiff,

v.

LOCAL UNION NO. 301, CHAUFFEURS, TEAMSTERS AND HELPERS and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA,

Defendants.

NO. 78 C 1137

DECISION

This case was referred by lot to a magistrate for proposed findings of damages sustained by the plaintiff due to jurisdictional picketing by the defendant Unions. The court had found liability on behalf of the employer by a decision dated May 19, 1979, and the Magistrate's recommendations are dated November 5, 1979. Defendants filed timely objections to most of his significant recommendations relating to the measure of damages. Based on a *de novo* review of the record, we find that the recommendations of the Magistrate on damages must be revised, but that his other recommendations are in accordance with the weight of the evidence and the reasonable inferences therefrom.

Defendants' unlawful actions lasted from August 22 to October 31, 1976, a period of 71 days. During that time, plaintiff's operations as a motor carrier were substantially shut down by picketing at its principal terminal in LaPorte, Indiana. Before and after the work stoppage, plaintiff employed approximately 40 drivers and crew. It filed no unfair practice charge against either defendant. It did, however, continuously offer employment

to the defendants' members and eventually obtained a cessation of the stoppage by negotiations. After that, operations were resumed but did not return to normalcy until some time later.

Plaintiff is not required to prove its damages or loss of profits with complete accuracy, particularly when this is caused by the illegal acts of the defendants. *Gulf Coast Building and Supply Co.* v. *I.B.E.W.*, 428 F.2d 121 (5th Cir. 1970), *cert. denied*, 400 U.S. 942 (1970). The record contains sufficiently specific proof of damages, but the Magistrate failed to find the full measure of plaintiff's damages proved by its records.

For the entire year of 1976 plaintiff sustained an operating loss of $74,670 (plaintiff's Ex. 13). It had shown an operating income of $151,188.24 up through August 21, 1976 (plaintiff's Ex. 12). By combining these two figures, the Magistrate found that plaintiff sustained an operating loss, for the period beginning with the strike on August 22, 1976 through the end of the year, totalling $225,858.24. (Proposed Finding of Fact No. 5 and Conclusions of Law No. 3.) This has the effect of wiping out the loss and restoring the profit earned up to the date of the work stoppage. It does not, however, restore profits lost after the plaintiff resumed operations.

There are no detailed figures in the record to show exactly how or when the net operating income up to August 21, 1976 was converted into an operating loss by the end of the year, but the inference that this was the result of the picketing is reasonable. Gross operating revenues for the year 1976 were $2,040,746. They had been $2,265,991 for the calendar year ending December 31, 1975 (plaintiff's Ex. 11). Operating revenues rebounded in 1977 to $2,697,053 (plaintiff's Ex. 14), and they had exceeded 1976's figure in 1973, 1974 and 1975 (*infra* p. 7). It is reasonable to conclude, therefore, that the substantial loss of operating revenue during and following the strike, combined with a practical inability to reduce fixed charges and overhead, caused plaintiff

to lose all of its net operating income received up to August 21, 1976 and to sustain an operating loss for that calendar year. However, we believe that the plaintiff's damages proximately caused by the strike should also include loss of reasonably expectable profit.

Plaintiff's net operating income of $151,188.24 before taxes for the year 1976 through August 21, 1976, works out to 8.7% of plaintiff's gross revenues for that same period (plaintiff's Ex. 12). Historically, plaintiff's net operating income, before taxes, was as follows (from plaintiff's Exhs. 8 through 15):

1971	$121,520	11.27%
1972	183,580	12.12%
1973	145,842	6.7%
1974	145,446	6.2%
1975	116,811	5.2%
1976 (through 8/21/76)	151 188	8.7%
1976 (entire year)	(74,670)	(3.6%)
1977	57,199	2.1%
1978	388,461	10.1%

From the foregoing tabulation, defendants contend that the net operating profit of 8.7% through August 21, 1976 is overstated and should be reduced to a declining average beginning with 1973, but we disagree. The year 1976 up to the strike was more profitable than the three preceeding years, but there is no evidence that it was excessive or even unusual. Applying the standard tort rule, defendants must take the plaintiff in its condition existing at the time when the wrong was committed.

Based on the average daily revenue of $7,399.75 which had been received for the year up to August 21, 1976 (cf. Recommended Finding No. 6 and plaintiff's Ex. 12), plaintiff lost $525,382 of gross operating revenue before taxes during the 71 days of the work stoppage. An average per diem rate of revenue is justified in the absence of any evidence that the revenues in the last four months of plaintiff's year would be any different from the other

months. The use of the before-tax figure is justified because plaintiff will be required to file an amended Federal Income Tax Return and pay taxes on any damages recovered. After the strike ended on October 31, 1976 plaintiff earned operating revenue of $309,205.09 during the 61 days remaining in 1976. On the per diem rate established prior to the work stoppage, this should have amounted to $451,384.83, a loss of gross operating revenue of $142,179.74. Since plaintiff had earned 8.7% on its revenue up to the date of the picketing, the net revenue loss beginning August 22, 1976 was $45,708.21 up to October 31, 1976. After that date, the 8.7% operating profit lost amounts to $12,369.64.

We therefore find that plaintiff lost net operating profit of $45,708.21 during the picketing and $12,369.64 for the balance of the year, totalling $58,077.85. It ended the year with an operating loss of $74,670 (plaintiff's Ex. 13) having netted $151,188.24 from operations up until the strike (plaintiff's Ex. 12). After the strike began, its continuing expenses not only eliminated the profit previously earned but also deprived plaintiff of additional profits of $58,077.85. Hence plaintiff's damages for 1976 totalled the sum of its profit up to August 21, its loss sustained after that date (which also wiped out the profit), and the profit which it would have received but for the work stoppage, for a total of $283,936.09. This is noticably higher than the earnings for any prior year (*supra*, p. 4), partly because plaintiff's daily gross to August 21, 1976 was better than previous years. On the other hand, the 1978 earnings turned out to be considerably higher than 1976 as reconstructed, and defendants have not shown that the 1976 routes or tariffs were atypical.

A different approach will be adopted for determining if strike damages were sustained in 1977, however, because there is no way to find a per diem revenue figure for that year which would be unaffected by the strike, yet plaintiff's gross revenues had generally been in-

creasing over the years, including 1976 as reconstructed. Plaintiff's gross operating revenues and growth for the years ending December 31 are as follows (plaintiff's Exhs. 8 through 15):

		Growth
1971	$1,078,627	
1972	1,514,531	40.4%
1973	2,071,053	36.7%
1974	2,341,894	13.1%
1975	2,265,991	(3.2%)
1976 (to Aug. 21)	1,731,541	
1976 (actual)	2,040,746	
1976 (revised)	2,780,308	22.7%
1977	2,697,053	
1978	3,838,511	

Plaintiff's average growth in gross operating revenues for the years beginning 1972 comes to 22% up through 1976 as reconstructed. The slight decrease in gross operating revenues in 1975 does not constitute a trend and is offset by the relatively large increases in 1972, 1973 and in 1976 as reconstructed (which is the same as the first 8 and ½ months of 1976). This affords a reasonable basis for computing what the gross operating revenues should have been in 1977.

It therefore appears that plaintiff also sustained some loss of gross revenues attributable to the strike in the year 1977, and this is confirmed by the return to a normal growth rate in 1978. Its gross operating revenues for 1977 could reasonably have been expected to increase by 22% over what the gross operating revenue should have been in 1976, or by $611,667.76. They actually decreased by $83,255, for a gross loss of revenues of $694,922.76.

Plaintiff actually earned 2.1% on its gross revenues for 1977 (plaintiff's Ex. 14). Its average profit for 1972 through 1976 was 7.8% if the period affected by the strike is eliminated (*supra*, p.4). Thus plaintiff lost expected net operating income of $54,203.98 in 1977, using the 7.8% average profit figure.

The year 1978 showed a gain of 13.16% in gross operating revenues over 1977 as reconstructed, and plaintiff earned 10.1% on that amount (plaintiff's Ex. 15). Since 1978 was relatively normal and was remote from the strike period, we find no damages were sustained by plaintiff in that year or afterwards.

Defendants further contend that plaintiff did not mitigate its damages as much as it should have. The Magistrate summarized the plaintiff's mitigation efforts in paragraphs 12 through 18 of his recommendations. We find and conclude that these findings are in accordance with the weight of the evidence in the record and that defendants' contentions to the contrary are speculative. Not knowing whether the strike would last one day or one month, plaintiff was justified in continuing to employ its office and managerial staff, retain the leases on its trucks, and generally hold open the opportunity for defendants' members to return to work. It did so, at great expense. At the same time plaintiff used continuous good faith efforts to resolve the dispute with defendants.

Defendants' most substantial argument with respect to failure to mitigate is that plaintiff should have filed an unfair labor practice charge with the National Labor Relations Board which defendants contend would have resulted in a prompt injunction. We cannot speculate why plaintiff did not exhaust this administrative and legal remedy, but we find no requirement to do so. It had the right, even under cases relied upon by defendants, to elect whatever remedy it believed to be the most effective to terminate the strike, and several alternatives were available. Congress has provided the remedy of damages by § 303 of the Labor-Management Relations Act (29 U.S.C. § 187), and plaintiff is entitled to enforce this statutory remedy, so long as it acts in good faith and does not neglect practical steps such as mediation and bargaining. *Vulcan Materials Co.* v. *United Steelworkers of America,* 430 F.2d 446 (5th Cir. 1970), *cert. denied,* 401 U.S. 963 (1971).

Nor can we speculate as to what action the National Labor Relations Board would have taken in this particular case, had a charge been filed by the plaintiff, nor how long it would have taken to obtain an injunction, should the Board have sought one. Even if plaintiff may have terminated the strike by engaging the processes of the N.L.R.B., there is no reasonable way to fix a date on which this may have occurred; defendants' averages based on other cases are not necessarily applicable to this one.

We find and conclude, however, that plaintiff is not entitled to the increase of $3,080 which it claims for unemployment tax contributions under the Indiana statute. The evidence on this subject is equivocal in our opinion (Tr. 112-14), and plaintiff's unaudited income statements (Exhs. 8 through 15) do not break out this figure for any year. Therefore, this item of damage has not been substantiated by the weight of the evidence. Nor did the Magistrate make any recommended finding concerning the amount of attorneys' fees sustained by the plaintiff as a result of the strike, and we find such an expense not reimbursable unless specifically authorized by statute or common law.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is entered in favor of plaintiff LaPorte Transit Company, Inc. and against the defendants Local Union No. 301, Chauffeurs, Teamsters and Helpers, and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, jointly and severally, in the amount of $283,936.09 for 1976 and $54,203.98 for 1977, plus costs. A Rule 58 judgment will be entered.

ENTER:

/s/ Thomas R. McMillen
Judge, U. S. District Court

DATED: Feb. 7, 1980

In the

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 80-1327

LAPORTE TRANSIT CO., INC.,

Appellee,

v.

LOCAL UNION NO. 301, CHAUFFEURS, TEAMSTERS AND HELPERS, et al.,

Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 78 C 1137

Thomas R. McMillen, *Judge.*

Heard November 4, 1980—Decided January 16, 1981

Before FAIRCHILD, *Chief Judge,* WISDOM, *Senior Circuit Judge,** and CUMMINGS, *Circuit Judge.*

CUMMINGS, *Circuit Judge.* Plaintiff brought this action under the Labor Management Relations Act (29 U.S.C. § 141 *et seq.*). Plaintiff is engaged in the business of carrying freight in interstate commerce by motor vehicle. According to the complaint, defendant Local Union 301, Chauffeurs, Teamsters and Helpers (Local 301) and co-defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (International Union) engaged in a strike and picketed

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* The Honorable John Minor Wisdom, Senior Circuit Judge of the Fifth Circuit of the United States, is sitting by designation.

plaintiff's truck terminal near LaPorte, Indiana, from August 22, 1976, until October 31, 1976. The object of the strike was said to be to force plaintiff to assign work to employees in Local 301 rather than to employees in another labor organization. This was said to violate Sections 8(b)(4)(D) and 303 of the Labor Management Relations Act[1] (29 U.S.C. §§ 158(b)(4)(D) and 187). As a result of the strike and picketing, plaintiff claimed to have been damaged in the amount of $425,000.

After a bench trial, Judge McMillen decided the issue of liability in favor of plaintiff and referred the case to a magistrate for a recommendation on the amount of damages. Magistrate Balog subsequently recommended that

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[1] Section 8(b)(4)(D) makes it an unfair labor practice for a labor organization or its agents to resort to a strike or coercion where an object thereof is

> "forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work."

Section 303 provides:

> "(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended.
>
> "(b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 of the National Labor Relations Act, as amended [29 U.S.C. § 185] without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."

plaintiff be awarded $313,881.88. After revising his recommendation in February 1980, the district court entered judgment against the defendants jointly and severally in the amount of $338,140.07 and costs. Thereupon defendants appealed. We reverse.

Factual Setting

Plaintiff and defendant Teamsters Local 301 were parties to a collective bargaining agreement governing the employment of a truck driver whose duties were to pick up freight and deliver it within Lake and McHenry Counties, Illinois, with a truck maintained in Libertyville, Illinois. The drivers at plaintiff's main terminal in LaPorte, Indiana, were members of Teamsters Local 298, which had a collective bargaining agreement with plaintiff governing the terms and conditions of employment of the Indiana drivers.

The record shows that plaintiff motor common carrier operated in interstate commerce between points in northern Indiana and northern Illinois. Its only terminal was in LaPorte, Indiana, and its drivers operating from that terminal were members of Local 298.

Plaintiff employed Robert Schotanus to drive a truck parked in Libertyville, Illinois, to make pickups and deliveries in Lake and McHenry Counties, Illinois. Freight picked up by Schotanus was transferred in Chicago to another truck and driven by a Local 298 driver to LaPorte. Freight to be delivered in Lake and McHenry Counties was handled in reverse fashion.

On December 19, 1975, Local 301 notified plaintiff that the collective bargaining agreement between them and covering Schotanus was being terminated by the Local on its expiration date, *viz.*, March 31, 1976.

On and after December 9, 1975, plaintiff notified Local 301 that as of April 1, 1976, it would conduct all its operations from the LaPorte, Indiana, terminal and would utilize only Local 298 drivers stationed there, pur-

suant to its collective bargaining agreement with Local 298 and with the concurrence of that Local's officials, to service southern Wisconsin and northern Illinois.

On March 25, 1976, plaintiff wrote Schotanus that he should report to LaPorte effective April 1, 1976, to drive his truck and to transfer his affiliation to Local 298. The Secretary-Treasurer of Local 301 thereupon wrote plaintiff that it would hold plaintiff responsible for any damages to Schotanus. Although the truck in question was transferred to LaPorte upon termination of plaintiff's contract with Local 301 and despite plaintiff's offer to pay his moving expenses, Schotanus did not appear there for work nor transfer his affiliation to Local 298. He is no longer employed by plaintiff.

On April 1, 1976, the day after the collective bargaining agreement between Local 301 and plaintiff had expired, Schotanus and Local 301 filed filed grievances concerning plaintiff's action. A Joint Grievance Committee decided the matter in favor of Schotanus and Local 301 on April 14, 1976.

On August 22, 1976, Local 301 personnel picketed plaintiff's LaPorte terminal and induced some Local 298 personnel to join in the picketing and strike, thus stopping the operations of plaintiff. Local 301 stated that the picketing and strike were authorized by defendant International Union which assertedly paid strike benefits to personnel of both Locals. The picketing and strike did not cease until October 31, 1976, and were for the purpose of forcing plaintiff to comply with the Joint Grievance Committee's award favoring Local 301 and Schotanus.

On August 25, 1976, plaintiff notified its employees that it considered the dispute to be between Locals 298 and 301 rather than between plaintiff and its employees. Also on August 25, the Central Conference of Teamsters notified plaintiff that the work stoppage had been authorized by the defendant International Union because plaintiff had refused to comply with the grievance award.

On October 27, 1976, plaintiff and Local 301 executed a memorandum of agreement resulting in the termination of the picketing and the withdrawal of the claims of Local 301 and Schotanus.[2] After Local 301's picketing was terminated, Local 298's members returned to work for plaintiff. This suit for damages followed in March 1978.

Decisions of the District Court

In his first decision, Judge McMillen stated that the strike by Local 298 was because of plaintiff's failure to abide by the decision of the Joint Grievance Committee under the expired contract between plaintiff and Local 301 awarding Schotanus his claim for wages and fringe benefits and awarding Local 301 work performed under the former collective bargaining agreement with respect to southern Wisconsin and northern Illinois.

The district judge held that the Joint Grievance Committee's award was without basis since there was no contract between plaintiff and Local 301 after March 31, 1976, and Schotanus had been fully paid up to that date when he refused to transfer to LaPorte and join Local 298. Therefore, the court stated that plaintiff had a threefold remedy: to sue to set aside the award, to sue Local 298 for a contract violation arising from its strike, or to sue these defendants under Sections 8(b)(4)(D) and 303 (App. 6-7).

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[2] Under the settlement agreement, plaintiff agreed to recognize Local 301 as the collective bargaining agent of plaintiff's drivers "if it ever established a terminal, garage, or stations equipment in the Counties of Lake and McHenry in the State of Illinois * * *" (App. 23). In turn, Local 301 agreed to waive any claim to work performed by Local 298 members from a terminal outside Lake and McHenry Counties. Plaintiff agreed to pay Schotanus' claims from April 1, 1976, to August 21, 1976 (App. 23).

The district court concluded that defendant Local 301 had engaged in jurisdictional picketing but not a strike at plaintiff's LaPorte premises and had encouraged Local 298 to engage in a strike. He found that the International Union had authorized and supported the activities of both Locals and held that the defendants had violated Section 8(b)(4)(D) because their actions were designed to require the plaintiff to assign work to a member of Local 301 rather than to members of Local 298.

Finally, the district court held that the October 27, 1976, settlement agreement between Local 301 and plaintiff did not release Local 301 or the International Union from this action for damages.

In his second decision, Judge McMillen modified the magistrate's recommendation on damages by finding that plaintiff's lost profits for 1976 total $283,936.09 and that in 1977 its lost expected net operating income was $54,203.98 or a total of $338,140.07 and that plaintiff had mitigated its damages as much as possible. The court denied plaintiff an additional $3,080 for unemployment tax contributions under an Indiana statute and refused to reimburse plaintiff for attorney's fees. We hold that there was no jurisdictional dispute between defendants and Local 298 during the entire work stoppage so that Sections 8(b)(4)(D) and 303 of the Act (note 1 *supra*) afforded plaintiff no relief.

Absence of Jurisdictional Dispute

Because Local 298 never claimed the work during the picketing but throughout that period consistently supported Local 301's claim, it was erroneous to hold that Locals 298 and 301 were striking to resolve a jurisdictional dispute so that Section 8(b)(4)(D) was violated by Local 301 and the authorizing International Union. Instead Local 298 was disclaiming the work by helping Local 301 to retrieve it during the entire work stoppage.

It is well settled that Section 8(b)(4)(D) and related Section 10(k) of the Labor Management Relations Act

were designed to resolve or prevent jurisdictional disputes.[3] As the Supreme Court explained in *National Labor Relations Board* v. *Radio Engineers* (*CBS*), 364 U.S. 573, 579, the reference in Section 10(k) to Section 8(b)(4)(D) is to a jurisdictional dispute "which is a dispute between two or more groups of employees over which is entitled to do certain work for an employer." Similarly, as in *National Labor Relations Board* v. *Plasterers' Union*, 404 U.S. 116, 135, if, as here, one union disclaims the work by supporting another union, there is no jurisdictional dispute because the applicability of Sections 10(k) and 8(b)(4)(D) "is premised on conflicting claims of unions or groups of employees for the same job * * *." Accordingly, in the *Plasterers' Union* case, the Court approved the Labor Board's *Safeway* rule[4] that a jurisdictional dispute within the purview of Section 10(k) and 8(b)(4)(D) only exists when there are rival claims to the work. 404 U.S. at 134.

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[3]Section 10(k) provides:

> "Whenever it is charged that any person has engaged in an unfair labor practive within the meaning of paragraph (4)(D) of section 8(b) [note 1 *supra*], the [Labor] Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they had adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed." (29 U.S.C. § 160(k).)

[4] *Highway Truck Drivers, Local 107* (*Safeway Stores, Inc.*), 134 NLRB 1320 (1961) is the pioneer authority. It has been followed ever since. See *Plasterers' Union, supra*, 404 U.S. at 134; see also *Sheet Metal Workers Local 9* (*John E. Davis*), 183 NLRB 443 (1970); *Local 272, Sheet Metal Workers Union* (*Valley Sheet Metal*), 136 NLRB 1402 (1962); *Teamsters Local 70* (*Hills Transportation*), 136 NLRB 1086 (1962).

The present lawsuit could succeed only if during the August 22—October 27, 1976, picketing and work stoppage the two Locals were engaged in a jurisdictional dispute by claiming the same work. However, the record is clear that rather than contesting Local 301's right to the work, Local 298 joined in the work stoppage in order to compel plaintiff to comply with the Joint Grievance Committee's April 14, 1976, decision awarding Local 301 member Schotanus all wages and fringe benefits that he lost or would lose until reinstated and holding that plaintiff's work performed within Kane, Lake and McHenry Counties and the northern part of Cook County, Illinois, "shall remain performed by the employees" represented by Local 301 (App. 27).

The complaint herein is limited to the period August 22, 1976, until the picketing and strike ceased on or about October 31, 1976 (Record Item #1, par. 3). Yet plaintiff has been unable to show that during that entire time Local 298 was ever seeking to perform the work that had been performed by a Local 301 member.

Defendant International Union is implicated in this lawsuit only because it authorized the work stoppage on or before August 26, 1976.[5] In truth, the authorization to Local 301 apparently occurred on or before August 22, the date of the commencement of the work stoppage (see Tr. 24-25, 124). Since, as seen, during the period of the work stoppage there was no jurisdictional dispute between the two Locals, the International Union's authorization of the work stoppage also did not violate Section 8(b)(4)(D) of the Act.

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[5] An August 26, 1976, telegram from the International Union to plaintiff stated that the International Union had authorized the work stoppage in order to enforce the Joint Grievance Committee's April 14 award in favor of Schotanus and Local 301 (Pl. Exhibit G).

As in the landmark *Safeway* case involving Section 10(k) of the Act and therefore necessarily Section 8(b)(4)(D) (see notes 1 and 3 *supra*), plaintiff created this dispute by transferring work away from Local 301, the strike here was in protest against plaintiff's action, and the strike was not by two competing employee groups, but was rather by two local unions seeking to enforce the Joint Grievance Committee's award in favor of Local 301. Such a strike does not constitute a jurisdictional dispute implicating Section 8(b)(4)(D). Consequently, plaintiff was not entitled to recover damages under Section 303 (note 1 *supra*). As a result, it is unnecessary for us to consider the other arguments presented by the parties.

The judgment of February 8, 1980, is reversed with instructions to enter judgment in favor of both defendants.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

February 18, 1981

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. JOHN MINOR WISDOM, *Senior Circuit Judge**
Hon. WALTER J. CUMMINGS, *Circuit Judge*

LaPORTE TRANSIT CO., INC.,

Plaintiff-Appellee,

No. 80-1327 *vs.*

LOCAL UNION NO. 301, CHAUFFEURS, TEAMSTERS AND HELPERS, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 78 C 1137

THOMAS R. MCMILLEN, *Judge.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* in the above-entitled cause by appellee LaPorte Transit Co., Inc., no judge in active service has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

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* The Honorable John Minor Wisdom, Senior Circuit Judge of the Fifth Circuit of the United States, is sitting by designation.

Corrected

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

February 20, 1981

Before

Hon. THOMAS E. FAIRCHILD, *Chief Judge*
Hon. JOHN MINOR WISDOM, *Senior Circuit Judge**
Hon. WALTER J. CUMMINGS, *Circuit Judge*

LaPORTE TRANSIT CO., INC.,

Plaintiff-Appellee,

No. 80-1327 *vs.*

LOCAL UNION NO. 301, CHAUFFEURS, TEAMSTERS AND HELPERS, et al.,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 78 C 1137

THOMAS R. McMILLEN, *Judge.*

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by appellee LaPorte Transit Co., Inc., all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable John Minor Wisdom, Senior Circuit Judge of the Fifth Circuit of the United States, is sitting by designation.